LIBRARY
SUPREME COURT

Office - Supreme Court, U. S.
FILED
APR 14 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 458

BROTHERHOOD OF RAILROAD TRAINMEN, an Unincorporated Association, and C. O. CARNAHAN, General Chairman, Brotherhood of Railroad Trainmen,
Petitioners,

v.

SIMON L. HOWARD, SR., and ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a Corporation,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENT SIMON L. HOWARD, SR.

VICTOR PACKMAN
JOSEPH C. WADDY
Counsel for Respondents

HENRY D. ESPY,
WILLIAM C. GARDNER,
Of Counsel.

Printed by Law Reporter Printing Co., 518 5th St., Wash., D. C.

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	4
The Negro "train porter" and the white "brakeman"	4
Historical Background	5
Efforts of the B.R.T. to Eliminate Negroes from Employment in Train Service Culminating in Agreement of March 7, 1946	7
The Result of the Agreement and Events Leading Up to This Litigation	10
SUMMARY OF ARGUMENT	10
ARGUMENT	12
I. The Court Below Had Jurisdiction of This Cause of Action to Determine Enforceable Rights Arising Under the Railway Labor Act and the Federal Constitution and That Jurisdiction Cannot Be Defeated by Loosely Labeling the Situation Either a Jurisdictional Dispute or a Representation Dispute	12
A. The National Railroad Adjustment Board Has No Jurisdiction Over This Cause	16
B. The National Mediation Board Has No Jurisdiction Over This Cause	21
C. Respondent Has No Adequate Administrative Remedy	29
II. The Right to Work	38
A. The B.R.T. May Not Use Its Statutory Position and Power to Deprive Respondent of His Right to Work	38
B. The Right to Strike Is Not Absolute	41
III. The Norris-LaGuardia Act Is Inapplicable	43
IV. Conclusion	45

INDEX—(Continued)

	Page
APPENDIX	1
Exhibit I—Memorandum of Understanding, Etc.	1
Exhibit II—Letter Dated March 15, 1928	3
Exhibit III—Memorandum on Discriminations, Etc.	4
Exhibit IV—Letter Signed by General Manager Shaeffer	10
Exhibit V—Letter, Limit Brown to J. E. Hutchison	11
Exhibit VI—Letter from Carrier to Limit Brown	12
Exhibit VII—Letter, Limit Brown to J. E. Hutchison	12
Exhibit VIII—Rules Governing Selection of Labor Members to National Railroad Adjustment Board	13
Exhibit IX—Memorandum of May 9, 1949, re Adjustment Board Procedure	16

TABLE OF CASES

Barr v. Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881	42
Bausch Machine Tool Co. v. Hill, 231 Mass. 30	42
Bautista v. Jones, 25 Cal. (2d) 746, 155 P. (2d) 343	43
Brotherhood of Locomotive Firemen & Enginemen v. Tunstall, 163 F. (2d) 289	13, 22
Brotherhood of Railroad Trainmen v. National Mediation Board, 135 F. (2d) 780	23
Brotherhood of Railroad Trainmen v. Templeton, 181 F. (2d) 527	45
Butchers Union Co. v. Crescent City, 111 U.S. 746	38
Central Metal Products Corp. v. O'Brien, 278 F. 827	39
City of Richmond v. Deans, 37 F. (2d) 712	29
Dorchy v. Kansas, 272 U.S. 306	41
Elgin, Joliet & Eastern R. Co. v. Burley, 325 U.S. 711	35
General Committee, Etc. v. M. K. T. R.R. Co., Et Al., 320 U.S. 323	15, 17, 18
Georgia v. Pennsylvania R.R. Co., 324 U.S. 439	30
Graham v. Brotherhood of Locomotive Firemen & Enginemen, 328 U.S. 232, 94 L. Ed. 22	13, 14, 15, 35, 44
Great Northern R.R. Co. v. Merchants Elevator Co., 259 U.S. 285	30
Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229	39
Hunter v. Atchison, Topeka & Santa Fe R. Co., 171 (2d) 594	42, 45
Hurd v. Hodge, 334 U.S. 24, 92 L. Ed. 1187	40
James v. Marinship Corp., 155 P. (2d) 992 (Cal. App.)	40
Kerr v. Pratt Library, 149 F. (2d) 212	40
Louisville & N. R. Co. v. U.S., 282 U.S. 740	23
Meccana v. Wanamaker, 253 U.S. 136, 64 L. Ed. 822	45
M. K. T. R. Co. v. Brotherhood of Ry. & S.S. Clerks, 188 F. (2d) 302	45
M. K. T. R. Co. v. Randolph, 164 F. (2d) 4	19

TABLE OF CASES—(Continued)

	Page
Moore v. Illinois Central R. Co., 312 U.S. 630	35
Nixon v. Condon, 286 U.S. 73, 76 L. Ed. 984	40, 41
Nord v. Griffin, 86 F. (2d) 481	14, 39
Order of Railway Conductors v. Pitney, 326 U.S. 561	15, 17, 18, 35
O. R. C. v. Swan, 329 U.S. 520	34
Rolax, Et Al. v. Atlantic Coast L. R. Co., Et Al., 186 F. (2d) 473	13, 15, 27, 29
Slocum v. Delaware, L. & W., 339 U.S. 239	17, 18
Smith v. Allwright, 321 U.S. 649	40, 41
State ex rel. St. Louis-San Francisco R. Co. v. Russell, 358 Mo. 1136, Cert. Denied, 338 U.S. 849	18
Steele v. L. & N. R. Co., 323 U.S. 192	13, 14, 15, 16, 30, 32, 35, 40
Switchmen's Union of N. A. v. National Mediation Board, 320 U.S. 297	15, 17, 21, 22, 27, 34, 35, 37, 40
Switchmen's Union of N. A. v. National Mediation Board, 135 F. (2d) 785	26
Texas & N. O. R. Co. v. Brotherhood of Ry. & S.S. Clerks, 281 U.S. 458	42
Truax v. Raich, 239 U.S. 33, 60 L. Ed. 131	13, 14, 16, 39
Tumey v. Ohio, 273 U.S. 510	34, 35, 37
Tunstall v. Brotherhood, Etc., Et Al., 323 U.S. 210, 89 L. Ed. 187	14, 15, 27, 29, 35
Virginian Ry. Co. v. System Federation No. 40, 300 U.S. 515, 81 L. Ed. 789	14, 15, 45
Williams v. International Boilermakers, 165 P. (2d) 903 (Cal. App.)	40
Wills v. Restaurant Employees, 26 Ohio (N.S.) 435	42

Constitution

Fifth Amendment	2, 14, 37, 40

Statutes

Civil Rights Act, 8 U.S.C., Sections 41, 43	2, 37, 39
Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C., Sec. 101, Et Seq.	2, 43, 44
Railway Labor Act, 48 Stat. 1185, 45 U. S. C., Sec. 151	2
45 U. S. C., Sec. 152-Ninth	21, 30
45 U. S. C., Sec. 153-First	16, 33, 37
45 U. S. C., Sec. 155	21, 30
45 U. S. C., Sec. 156	13

Miscellaneous

Monograph of the Attorney General's Committee on Administrative Procedure, Part 4	32
National Mediation Board Case No. R-218	23
University of Pennsylvania Law Review, Vol. 77, PP. 52, Et Seq., Mason, "The Right to Strike"	42

In The

Supreme Court of the United States

October Term, 1951

No. 458

Brotherhood of Railroad Trainmen, an Unincorporated Association, and C. O. Carnahan, General Chairman, Brotherhood of Railroad Trainmen,
Petitioners,

v.

Simon L. Howard, Sr., and St. Louis-San Francisco Railway Company, a Corporation,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENT SIMON L. HOWARD, SR.

OPINIONS BELOW

The opinion of the District Court (R. 267) is reported in 72 F. Supp. 695 and that of the Court of Appeals for the Eighth Circuit (R. 339) is reported in 191 F. (2nd) 442.

JURISDICTION

The jurisdiction of this Court under Title 28 U.S.C., Section 1254 (1) is conceded.

STATUTES INVOLVED

Statutes involved are the Railway Labor Act, 48 Stat. 1185, 45 U.S.C. Sections 151 et seq., and the Norris-La-Guardia Act, 47 Stat. 70, 29 U.S.C., Section 101, et seq.; the Federal Civil Rights Act, 8 U. S. C., Sections 41 and 43, and the Fifth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

This is a class suit filed on March 29, 1946, by a Negro passenger brakeman (designated by his employer, St. Louis-San Francisco Railway Co.,[1] as "trainporter"), on behalf of himself and other employees similarly situated against the "Frisco" and petitioners herein, Brotherhood of Railroad Trainmen[2] (the collective bargaining representative of the craft or class of brakemen on the "Frisco") and its General Chairman, to enforce rights under the Railway Labor Act, and rights guaranteed to citizens of the United States by the Constitution and laws thereof.

In the complaint, respondent sought injunctions restraining the "Frisco" and B.R.T. from enforcing an agreement dated March 7, 1946 (negotiated in secrecy without notice to respondent), which was executed by the "Frisco" under strike threat by the B.R.T. and which read, "Effective April 1, 1946, the practice of train porters performing work generally recognized as brakemen's duties, will be discontinued * * *"

Respondent averred that B.R.T. in coercing the agreement violated its statutory obligation to the Negro brakemen in favor of white brakemen, and that B.R.T. and its members should be prevented from obtaining the benefits of such illegal and discriminatory action, and prayed that the "Frisco" should be enjoined from hiring white brakemen to replace them in accordance with said agreement.

---

[1] Hereinafter referred to as "Frisco."
[2] Hereinafter referred to as B.R.T.

Respondent also sought a declaratory judgment that the said agreement was void and against public policy, in that it was the result of a conspiracy to deprive citizens of their right to a livelihood because of their race or color, and that a notice of less than thirty days served by the "Frisco" on the train porters was inadequate and in violation of the Railway Labor Act.

The District Court held, after a hearing on the merits (R. 288, 290), that the notices given the "train porters" were in violation of Sections 2-Seventh and 6 of the Railway Labor Act and enjoined "Frisco" from abolishing the positions of respondent and his class under the notices that had been issued, but held that it was without jurisdiction to determine whether the "train porters" should be classified as brakemen and represented by B.R.T. because Congress had conferred upon the National Mediation Board exclusive jurisdiction to determine all disputed questions concerning classification for purposes of representation under the Railway Labor Act, and further, that this case presented a jurisdictional dispute between B.R.T. and the "train porters" over which the National Railroad Adjustment Board had exclusive power.

It thereupon ordered the proceedings stayed so that respondent might proceed before the National Railroad Adjustment Board and the National Mediation Board for a determination of the "claims asserted by him" (R. 290).

Cross-appeals were taken to the Court of Appeals, 8th Circuit, by the respondents where the case was twice briefed and twice argued (the first submission was set aside without an opinion some 16 months later). On September 11, 1951, the court in an unanimous opinion affirmed the decree of the trial court with respect to the invalidity of the notices but in all other respects reversed the decree, and remanded the cause with directions to enter an injunction as set out in its Opinion.

STATEMENT OF FACTS

The special problems presented by this case can be fully understood only in the light of the historical background. In order that the Court may have a full and complete picture of the particular and controlling facts, respondent makes the following statement:

The Negro "Trainporter" and the White "Brakeman"

The term "train porter" is a racial badge applying only to Negro head-end passenger brakemen (R. 60-61, 97-99). The train porters are required by the "Frisco" to perform the duties of head-end brakemen on its passenger trains as well as the duties of keeping the cars clean while enroute and assisting passengers on and off the trains. The only employees required to perform both head-end braking duties and porters' duties are Negro employees. White employees performing head-end braking duties on passenger trains are designated "brakemen." Respondent spends 95% of his working time performing head-end braking functions and the remaining 5% performing the functions of porter (R. 20, 134-5). Negroes performing head-end braking duties are paid sub-standard wages (R. 42, 284). White men performing head-end braking duties are paid considerably more for doing slightly less work (R. 22).

The train porter[3] is a member of a passenger train crew and does all of the head-end braking work on the train to which he is assigned. White "brakemen" and Negro "train porters" are never assigned to the same run at the same time (R. 131); but white brakemen and Negro train porters have been assigned interchangeably on the head-end of certain trains (R. 42). The removal of a train porter from a train means his replacement by a white brakeman (R. 134) to perform the same head-end braking duties the train porter had been performing (R. 131).

---

[3] Not to be confused with a chair car porter or a pullman porter who are not trainmen and who have no train operating functions.

One of the crafts or classes of employees on the "Frisco" is the craft or class of trainmen, also known as "brakemen." Said craft or class encompasses employees performing various braking duties. Among such sub-groups composing the craft or class are switchmen (yard brakemen), flagmen (rear-end brakemen), baggagemen brakemen (who handle baggage) and the employees performing head-end braking duties. The B.R.T. is the representative under the Railway Labor Act of the entire craft or class of brakemen (trainmen) employed on the "Frisco." Negroes are excluded from membership in B.R.T. (R. 283), and are excluded from employment as rear-end brakemen (flagmen) (R. 98, 103). At the present time Negro train porters and the white brakemen share the same educational standards, pass the same examinations and have equal responsibility regarding their braking duties (R. 264-265).

Historical Background

Respondent, Howard, and other Negro employees similarly situated have been performing head-end braking duties for "Frisco" for more than forty years. Prior to World War I it was the practice of Southern railroads never to pay Negroes the same wages as whites for the same work. Then the United States Railroad Administration issued General Order No. 27 in May, 1918, of which Article VI provided:

"Colored Firemen, Trainmen and Switchmen—Effective June 1, 1918, colored men employed as firemen, trainmen, and switchmen shall be paid the same rate of wages as are paid white men in the same capacities" (R. 147).

Supplement No. 12 to General Order No. 27 was issued December 2, 1918, to clarify the position of the Negro "train porter." It provided: "To carry out the intent of Article VI, General Order No. 27, and retroactive to June 1, 1918, it is ordered:

"1. Employees in a passenger train crew, except conductor and baggagemaster, qualified and regularly required to perform the following essential duties, will be designated as passenger brakemen or flagmen and paid accordingly:

"(a) Inspect cars and test signal and brake apparatus for the safety of train movement.

"(b) Use hand and lamp signals for the protection and movement of trains.

"(c) Open and close switches.

"(d) Couple and uncouple cars and engines and the hose and chain attachments thereof.

"(e) Compare watches when required by rule.

"2. Where white brakemen are not employed, the compensation and overtime rule for colored brakemen shall be the same, for both passenger and freight service, as for the same positions on the minimum paid contiguous road.

"3. This order shall not curtail the duties of employees heretofore classed as "train porters."

"4. This order shall not infringe upon the seniority rights of white trainmen" (R. 148)

This functional test by a governmental authority is the only one ever established to determine the classification of the Negro employees on the head-end of the passenger trains.

General Order No. 8, par. 5, United States Railroad Administration, had previously laid down the rule:

"No discrimination will be made in the employment, retention or conditions of employment of employees because of membership or non-membership in labor organizations" (R. 148).

Under these General Orders and Supplement No. 12 the Negro "train porters" without a change in duty were reclassified as passenger brakemen and paid brakemen's wages during the remainder of the time the railroads were under Federal control (R. 23, 122, 141, 233, 284-285).

B.R.T. in 1919 demanded that all colored men on passenger trains receiving brakemen's pay should be on the same seniority list with other brakemen, and that positions be assigned in accordance to seniority, not race (R. 97-99, 100).

On March 15, 1920, B.R.T. negotiated a basic working agreement covering rates of pay, rules and working conditions for *brakemen* on the "Frisco". The Negro head-end passenger brakemen worked under that agreement until the railroads were returned to private management, on February 1, 1921, when the carriers arbitrarily and over the protest of the Negroes, renominated the Negroes as "train porters" and cut their pay nearly in half, without reducing their duties (R. 24, 32, 145, 151, 285). The carrier designated one of the "train porters" General Chairman for the train porters and coerced the train porters one by one into individually ratifying the reclassification and reduction in pay (R. 24, 34-35).

At that time the Negro "train porters" were unrepresented before management and had no organization. The first organization (a small committee) was formed to try to obtain relief against the arbitrary action of the carrier, mentioned above. Their efforts in self help resulted in frustration. A suit for back wages and for reclassification filed by them as unorganized workers with the United States Railroad Labor Board dragged on and although lost on the back wage issue to date of the decision (March 5, 1924), the main issue of reclassification was expressly deferred for further determination (R. 147). The record is silent as to any ultimate decision.

Efforts of the B.R.T. to Eliminate Negroes from Employment in Train Service Culminating in Agreement of March 7, 1946.

For many years the B.R.T. and the other operating Brotherhoods (the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen,

and Order of Railway Conductors) have opposed the use of Negroes by the carrier in train, engine, and yard service; and on March 14, 1928, forced the carrier into an agreement that

> "in the future hiring of employees in train, engine and yard service but not including train porters, only white men shall be employed" (R. 59-61). (Respondent's Appendix, pp. 1, 2).

No Negroes have been hired as firemen or under job title of "brakemen" since March 14, 1928 (R. 23, 64, 66-67, 73). The Brotherhoods even refused to permit any Negroes to be hired during the emergency manpower shortage in World War II (R. 118-119). The number of Negro freight brakemen has fallen considerably as a result of the 1928 Agreement (R. 133).

In the past the B.R.T. made frequent efforts of one kind or another to displace the colored train porters (R. 105-106). On December 21, 1945, these efforts resulted in B.R.T. floating a strike ballot on the "Frisco" lines covering several unresolved disputes, which included

"Case No. 3. Complaint of Brotherhood of Railroad Trainmen against train porters being used to perform the duties of brakemen on passenger trains on all the lines of the SL-SF Railway Co. and SL-SF Tex. Railway Co.; and claim that additional brakemen covered by and paid under the respective brakemen agreement should be used to perform the duties of brakemen now being performed by train porters, and claim of brakemen dated August 2, 1945, be sustained" (R. 124-125).

The carrier had previously rejected such demand on the ground "train porters are not doing anything now that they haven't done all these years" (R. 122, 130).

B.R.T. also made a demand (Case No. 12) to take train porters off the head-end of troop trains where they were

doing no cleaning but only straight braking work (R. 38, 120-121, 125).

Pursuant to a request by the carriers to the National Mediation Board the President of the United States created an Emergency Board under the Railway Labor Act which held hearings in St. Louis January 11-18, 1946. The B.T.B.P.S.F. and R.E. Inc. (a Negro organization) attempted to intervene and be heard on behalf of the train porters but the Emergency Board refused permission to intervene or be heard (R. 213-215). The Emergency Board recommended that the B.R.T. and the carrier submit cases 3 and 12 to the First Division of the National Railroad Adjustment Board (R. 216-219). The B.R.T. refused and set a new date for withdrawal of its members from service (R. 128, 131, 220-221). As a result conferences were resumed and culminated in the agreement of March 7, 1946, above noted (R. 221-223), which gave rise to the instant case.

The B.R.T. did not demand the discharge of the "train porters" in so many words (R. 129, 288), but they did demand that additional brakemen be added to the crew to perform the braking duties theretofore performed by the "train porters" (R. 124-125) which constituted 95% of the "train porters" time and that those functions be taken away from "train porters" (R. 130, 20).

The trial court found specifically that the carrier made the agreement solely because of duress and strike threats (R. 279-280, 287); that at no time were the "train porters" represented during the negotiations (R. 129, 288), and that the "train porters" were performing their duties satisfactorily (R. 288). The carrier desired to retain the services of the train porters prior to the agreement of March 7, 1946, and decided to abolish the position of "train porter" solely because it was uneconomical to retain it if "train porters" could not perform the head-end braking duties

(R. 128, 279-280, 288). (Also see Opinion of Court of Appeals, R. 340, 343.)

The Result of the Agreement and Events Leading Up to This Litigation

On March 9, 1946, the carriers sent out notice that because of the agreement with the B.R.T., effective April 1, 1946, all train porter positions would be discontinued (R. 224). Respondent Howard received notice March 14, 1946, his job would be abolished April 1, 1946; and his run was bulletined for bid by white brakemen (R. 25). The "train porters" protested, and asked the carrier to suspend operation of the March 7, 1946, agreement. The carrier refused (R. 157-159).

The "train porters" wired the President, Secretary-Treasurer of the B.R.T. and Petitioner Carnahan, March 19, 1946, asking representation, to join the B.R.T., and for the B.R.T. to set aside the March 7, 1946, Agreement (R. 53-54). They appealed unsuccessfully to the National Mediation Board March 19, 1946 (R. 245), March 20, 1946 (R. 247-249), and to First Division of the National Railroad Adjustment Board (R. 251) before respondent Howard filed the instant suit.

SUMMARY OF ARGUMENT

The Court below had jurisdiction of this cause of action to determine enforceable rights arising under the Railway Labor Act and the Federal Constitution. That jurisdiction cannot be defeated by loosely labeling the situation either a jurisdictional dispute or a representation dispute.

Respondent is a Negro member of the craft or class of brakemen employed by the "Frisco" and has the right to be represented by the representative of that craft fairly, impartially, in good faith and without hostile discrimination. An action to enforce this right is justiciable and cog-

nizable in the Federal Courts. This dispute would never have arisen but for respondent's race.

Neither the National Railroad Adjustment Board nor the National Mediation Board has jurisdiction of this cause.

The sole jurisdiction of the National Railroad Adjustment Board is to interpret and apply the terms of collective bargaining agreements. Plaintiff seeks to enforce statutory rights, not contract rights. There is no "jurisdictional" dispute between two labor organizations necessitating the determination of the point where the jurisdiction of one craft ends and the authority of another begins.

There is no "representation" dispute necessitating the determination of craft or class within the jurisdiction of the National Mediation Board. All parties admit that the duties involved in the dispute come within the jurisdiction of the brakemen's craft and that the B.R.T. is the representative of that craft. The only question of representation involved in this cause is the refusal of the B.R.T. to give Negro brakemen fair and impartial representation. Such a dispute is for the courts; not the National Mediation Board.

Equity regards substance and not form.

The facts that respondent and others similarly situated bear the racial identification of "train porters" and have been discriminated against by the carrier for many years does not make them any less brakemen and certainly cannot justify the B.R.T. in making a further discrimination based on that discrimination; or in trying to eliminate them entirely from their employment.

Respondent has no adequate administrative remedy. Mediation and conciliation by the National Mediation Board would accomplish nothing. Self help is futile. The National Railroad Adjustment Board is an improper tribunal to hear and determine this cause because its set-up is so geared and manned that respondent would be taking his case

before the same persons against whom his complaint is made. Such a Board cannot satisfy the Constitutional requirement of due process.

Respondent seeks to protect his constitutional right to work and to follow a common calling. Unjustified interference with that right by third parties is actionable. While carrying on collective bargaining the bargaining representative under the Railway Labor Act is exercising governmental power and it may not use its position and power to force the employer to discharge respondent, solely on the grounds of race. Such action is void as being against public policy and is unconstitutional.

The right to strike is not absolute. The legality of a strike depends upon its purpose as well as the means employed. A strike to deprive citizens of the United States of their Constitutional rights is illegal. The courts have power to protect individual workers against the loss of their jobs resulting from abuse of statutory power by powerful labor unions.

The Norris-LaGuardia Act is not applicable to this case. That act may not be construed to deprive railroad employees of an injunctive remedy to prevent irreparable injury caused by the violation of rights conferred upon employees by subsequent labor legislation or of civil rights protected by the Constitution of the United States.

ARGUMENT

I. The Court Below Had Jurisdiction of This Cause of Action to Determine Enforceable Rights Arising Under the Railway Labor Act and the Federal Constitution and That Jurisdiction Cannot Be Defeated by Loosely Labeling the Situation Either a Jurisdictional Dispute or a Representation Dispute

In this case respondent invoked the jurisdiction of the Court to enforce statutory and civil rights guaranteed to

him and his class by the Railway Labor Act and the Constitution of the United States.

Under the Railway Labor Act Negro railroad workers have the right to be represented by the collective bargaining representative of their craft or class fairly, impartially, in good faith and without hostile discrimination, and to be free from employment contracts and practices that discriminate against them on the basis of race or color.

Steele v. *L. & N. R. Co.*, 323 U. S. 192, 89 L. Ed. 173.
Brotherhood of Locomotive Firemen & Enginemen v. *Tunstall*, 163 F. (2d) 289.
Graham v. *Brotherhood of Locomotive Firemen & Enginemen*, 338 U. S. 232, 94 L. Ed. 22.
Rolax, et al. v. *Atlantic C. Line R. Co., et al.*, 186 F. (2d) 473.

The Railway Labor Act forbids railroad carriers from changing the working conditions of their employees without first giving thirty days notice of the change.

45 U. S. C., Section 156.

The right to work for a living in a common calling, free from artificial interference, is a fundamental constitutionally protected right.

Truax v. *Raich*, 239 U. S. 33, 60 L. Ed. 131.

Inasmuch as the instant case was brought to protect the above-described federal statutory and civil rights which respondent alleged and proved were being violated and jeopardized by the actions of his collective bargaining representative under the Railway Labor Act and a railroad carrier, the Court below had, and properly exercised jurisdiction. That Federal Courts have jurisdiction of such causes of action is no longer open to question, for the decisions of this Court and other Federal Courts have clearly established their justiciability.

A suit to enforce the right to fair and impartial repre-

sentation under the Railway Labor Act states a cause of action;

Steele v. *L. & N. R. Co.*, supra;
Graham v. *Brotherhood of Locomotive Firemen & Enginemen*, supra.

and presents a federal question that the Courts of the United States have jurisdiction to hear and determine.

Tunstall v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210, 89 L. Ed. 187.

Obligations placed upon railroad carriers by the Railway Labor Act are enforceable in the Federal Courts.

Virginian R. Co. v. *System Federation No. 40*, 300 U. S. 515, 81 L. Ed. 789.

This Court declared in *Traux* v. *Raich*, supra;

> "It requires no argument to show that the right to work for a living in the common occupations of the community is the very essence of the *personal freedom and opportunity* that it was the purpose of the Amendment to secure. (Citing Cases.) If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words."

In *Nord et al.* v. *Griffin*, 86 F. (2d) 481, 483, the United States Circuit Court of Appeals (7th Circuit) stated:

> "The right to earn a living and to continue in employment unmolested by efforts to enforce void enactments or adjudications is entitled to protection, in the absence of an adequate remedy at law."

When the pleadings and the proof in this case are tested by the above well settled principles of law it is immediately apparent that this case falls within the general jurisdiction of Federal courts; and, unless there is present in the case

some factor either ousting or limiting that jurisdiction, the justiciability of the cause is beyond question.

Petitioners desperately seek to find such ousting or limiting factor by disregarding the plain nature of the *rights* which respondent seeks to enforce and loosely labeling the entire situation either a "representation" dispute or a "jurisdictional" dispute over which the administrative agencies created by the Railway Labor Act have exclusive jurisdiction. Respondent denies and the Record belies the relevancy of these contentions.

In this connection it should be pointed out that, in amending the Railway Labor Act in June, 1934, Congress did not confer on the administrative agencies created by the Act jurisdiction to determine *all* controversies arising under that Act.

Steele v. *L. & N. R. Co.*, supra.
Tunstall v. *Brotherhood, etc., et al.*, supra.
Graham v. *Brotherhood of Locomotive Firemen & Enginemen, et al.*, supra.
Virginian Ry. Co. v. *System Federations No. 40*, supra.
Rolax, et al. v. *Atlantic Coast L. R. Co., et al.*, 186 F. (2d) 473.

On the contrary, it is clear from the adjudicated cases that Congress has conferred on the National Railroad Adjustment Board and the National Mediation Board exclusive jurisdiction only over certain controversies incident to the administration of the Act.

General Committee of Adjustment, etc. v. *M. K. T. Railroad Co., et al.*, 320 U. S. 323.
Switchmen's Union of N. A. v. *National Mediation Bd.*, 320 U. S. 297.
Order of Railway Conductors v. *Pitney*, 326 U. S. 561.

Furthermore, resort to such agencies is not prerequisite to relief in equity where a hearing before them, if available, would not constitute an adequate administrative remedy.

Steele v. *L. & N. Railroad Co.*, supra.

When Congress determined the functions of these administrative agencies it did not confer upon them jurisdiction to adjudicate the right of a minority member of a craft or class to the fair and impartial representation due him by his collective bargaining representative. Such power was left within the general jurisdiction of the Courts.

Steele v. *L. & N. Railroad Co.*, supra.

Neither did Congress, nor could it, constitutionally authorize the collective bargaining representative of a craft or class to use its statutory position and power to prevent citizens of the United States, on the ground of their race or color, from continuing in their employment and earning a living in a common calling.

Truax v. *Raich*, supra.

A. The National Railroad Adjustment Board Has No Jurisdiction Over This Cause

The sole jurisdiction given the National Railroad Adjustment Board is to pass upon grievances and disputes arising under existing collective agreements.

45 U. S. C., Section 153.

In so doing, it merely interprets and applies the terms of those *agreements* in disputes between an employee or group of employees on the one hand, and a carrier or carriers on the other. Here it must be remembered that there is no agreement or contract to be interpreted *because respondent has not bottomed his claim upon any contract but upon the statutory right of fair and impartial representation due him by his statutory agent.* His rights do not stem from any contract but from the statute itself. Nor is respondent questioning the "jurisdiction" of the BRT over him and the brakeman's craft. On the contrary, he is *affirming* that jurisdiction and asking the court to enforce his personal statutory rights arising from that relationship.

In order to have a jurisdictional dispute within the contemplation of the Railway Labor Act there must be "an asserted overlapping interests of *two* or more crafts".

> *General Committee, B. L. E.* v. *M. K. T.*, 320 U. S. 323, 335.
> *Accord: Switchmen's Union of North America* v. *National Mediation Board*, 320 U. S. 297 at 302-6.
>
> "It involves a determination of the point where the jurisdiction of one craft ends and where the authority of the other begins." 320 U. S., supra, l.c. 343.

This is not a case of *one labor organization* bringing an action against *another labor organization* in which the first labor organization contends that it is entitled to an exclusive monopoly or control of jobs which the other labor organization, in turn, claims for its members. This is a case where an individual railroad employee, for himself and other individual employees, contends that his collective bargaining representative failed to represent him fairly, impartially, in good faith and without hostile discrimination and used its federal statutory position under the Railway Labor Act to discriminate against him, solely on account of race, by forcing from his employer an agreement, which, if permitted to stand, would cause him to lose his employment.

It is immaterial to the issues of this case that respondent was at one time a member of a self-defense organization which, because of necessity, was set up by members of his race in a vain and futile attempt to protect rights that his collective bargaining representative would not protect. There is no parallel in the facts here and those involved in *Order of Ry. Conductors* v. *Pitney*, 326 U. S. 561, or in *Slocum* v. *Delaware, L. & W.*, 339 U. S. 239, or in *General Committee, B. L. E.* v. *M. K. T.*, supra. In each of said cases two separate unions were vying with each other for the benefit of their respective members. There was no adversary claim by an individual employee against his representative. In each case the dispute was between white or-

ganizations and did not involve any racial issues or other discrimination based on the accident of birth. Nor was the National Railroad Adjustment Board disqualified by reason of its make-up to determine those disputes as will hereinafter be shown with respect to this case.

In *General Committee, B. of L. E.* v. *Missouri*, K. T. R. Co., 320 U. S. 323, 88 L. Ed. 76, this Court held that a dispute between the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen as to which organization was the proper bargaining representative under the Railway Labor Act for the purpose of legislating with respect to the calling of emergency engineers, was non-justiciable because it required a determination of a matter referable to the National Mediation Board and did not involve a right created by Congress which was intended to be enforceable in the courts.

Order of Railway Conductors v. *Pitney*, 326 U. S. 561, 90 L. Ed. 318, involved the question as to what extent a Federal District Court having charge of a railroad reorganization has power to adjudicate a jurisdictional dispute involving the railroad and two accredited bargaining representatives under the Railway Labor Act, *where each union was claiming that its collective bargaining agreement* entitled it to supply certain conductors. This Court held that the interpretation of the agreements was a matter for the National Railroad Adjustment Board.

In *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 561, 94 L. Ed. 795, the railroad company was seeking a declaratory judgment in a dispute between two unions *concerning the scope of their respective agreements*, each claiming for its members certain jobs in the carrier yards at Elmira, New York.

Nor are respondent's rights determined by the case of *State ex rel. St. Louis-San Francisco R. Co.* v. *Russell*, 358 Mo. 1136, 219 S.W. (2d) 340 (Cert. Denied, 94 L. Ed. 520). The facts in that case were not ruled on upon the merits;

they grew out of a different set of circumstances and the issues differed in many respects from those presented in this case. Furthermore, the opinion of the Missouri Supreme Court was based upon the reasoning of Judge Duncan, the trial judge herein. The authority cited was the opinion of Judge Duncan (72 F. Supp. 695), which has now been reversed by the Circuit Court of Appeals. In addition there is a curious and irreconcilable inconsistency between the Opinion of the trial court herein and his conclusions of law which renders questionable the soundness of result in the *Russell* case which followed it.

Nothing in the position taken herein by the respondent nor in the opinion of the Circuit Court of Appeals below conflicts with the decision of the Court in *Missouri-Kansas-Texas R. Co.* v. *Randolph*, 164 F. (2d) 4 (8th Cir.), where a Negro *labor organization* brought suit against a railroad and the Brotherhood of Railroad Trainmen, *another labor organization*, to restrain the railroad from cancelling a contract with plaintiff and to restrain the defendant from continuing to coerce or induce the railroad to breach or abrogate the contract of the Negro organization. In that case the employees claimed to be of a different craft and sought protection of their *collective bargaining contract* rights. The Court stated that the temporary injunction insofar as it ran against the carrier was based solely on the lower court's conclusion that the Brotherhood of Railroad Trainmen and its members were guilty of past tortious conduct. The Court of Appeals concluded that there was no tortious conduct on the part of the B.R.T. justifying the temporary injunction, and further, *that there was nothing in the record to indicate that racial considerations had anything to do "with this labor dispute."*

No amount of artifice on the part of the B.R.T. can blot out the ugly fact shown by this record that considerations of race formed the basis for the Agreement of March 7, 1946, and that if respondent had been of the white race this dis-

pute could never have arisen. Morey, the B.R.T.'s former General Chairman on the "Frisco" lines, made no bones about it:

> "Q. (Mr. Packman): And you wanted only the white men to be brakemen?
> A. (Mr. Morey): That is right" (R. 70).

Morey was asked why the BRT had never undertaken to represent the "train porters". He replied:

> "Well, the reason for it was, to begin with, it would be unfair to represent a fellow that you couldn't give membership to" (R. 75).

On September 18, 1926, J. E. Hutchison, Vice President of the Carrier, wrote to C. H. Baltzell, a division superintendent (R. 105-106), that

(Plaintiff's Exhibit 21)*

"Your letter September 17th relative to displacing colored porters on passenger trains.

"There has been for years a determined effort on the part of the train service employes to get the colored men out of employment on our trains and engines and they have done everything that they could to accomplish this. During the time of Federal control an interpretation of seniority was gotten from governmental source and applied to all the railroads, which made all of the men in train and engine service be handled on one seniority list. In view of the fact that local sentiment made it impossible for us to work a colored brakeman as a flagman it was necessary for the colored brakeman to always work ahead. The men tried by means of this seniority arrangement to crowd these men out of service and did crowd a good many of them out. This is just one of the many efforts.

---

* Letter dated September 18, 1926, addressed to C. H. Baltzell, Superintendent, from J. E. Hutcheson, Vice President, St. Louis-San Francisco Railway Co.

"There have been frequent efforts of one kind and another made to displace the colored porters on the trains but the white men have never been quite willing to take over the work that the colored men do and whenever it came to an issue they have usually side-stepped it some way or another.

"Yours very truly,

"(Signed) J. E. HUTCHISON."

When the above evidence is considered with the Agreement of March 14, 1928 (R. 59-61), (Respondent's Appdx. pp. 1-2), where the big four railroad Brotherhoods, including the B.R.T., blandly admitted that for years they had been *demanding* that the carrier hire no more Negro brakemen or firemen, the intent and motives of the B.R.T. become crystal clear and reveals this dispute to be exactly what it is: A suit by a Negro member of the craft or class of brakemen against the representative of that craft or class to force that representative to represent him fairly, impartially, in good faith and without hostile discrimination. Of such a dispute, this Court held in the *Steele* case, supra:

> "The question here presented is not one of a jurisdictional dispute, determinable under the administrative scheme set up by the Act * * * ". 270 U. S. 1, l.c. 204.

B. The National Mediation Board Has No Jurisdiction Over This Cause

Nor can the B.R.T. take advantage of the racial designation of respondent as "train porter" and, by using such designation, deny its responsibility to the Negro members of the craft or class, and convert this cause into a representation dispute referable only to the National Mediation Board.

The National Mediation Board has jurisdiction to handle three types of cases: (1) "Mediation" cases (45 U. S. C., Section 155-First); (2) "Interpretation" cases (45 U. S. C., Section 155-Second), and (3) "Representation" cases (45

U. S. C., Section 152-Ninth). No argument is necessary to illustrate that this is neither a "mediation" case nor an "interpretation" case. Indeed, petitioners do not even suggest it to be such. They content themselves with saying that this is a "representation" dispute and "not a question of color". In an attempt to substantiate this position they conveniently high-hurdle the substantial facts of the Record and emphasize that since the carrier has dubbed respondent a "train porter" and has otherwise discriminated against him for years by requiring him to perform more work for less pay, the B.R.T. may take advantage of that discrimination and eliminate him from the craft. In the case of *Brotherhood, etc.*, v. *Tunstall*, 163 F. 2d 289, Circuit Judge Parker answered that specious contention in the following appropriate language:

> "The fact that the railroads have discriminated against Negroes in the matter of promotability, does not justify the Brotherhood, which represents them as bargaining agent, in making a further discrimination based on that discrimination. Because the railroads do not permit Negroes to hold the position of engineer, is no reason why a bargaining agent representing them should use its bargaining power to deprive them of desirable positions as firemen which the railroads do permit them to hold. This seems so elementary as not to permit of argument. Such action by a bargaining representative clearly violates the rule laid down by the Supreme Court in the *Steele* case, supra, as to what is permissible in collective bargaining."

And this Court held in the *Steele* case, supra, that "discriminations based on race alone are obviously irrelevant and invidious". 323 U.S. 192, 203.

The Railway Labor Act gives exclusive jurisdiction to the National Mediation Board to determine *election representation disputes* where the question involved is *who shall be the representative of a craft or class* for the purposes of

collective bargaining. As an incident to that jurisdiction, it may determine who are members of the craft or class and eligible to participate in an election to select such representative.

The late Mr. Justice Rutledge, when he was an associate justice of the Court of Appeals of the District of Columbia, wrote a separate concurring opinion in *Brotherhood of R. Trainmen* v. *National M. Board*, 135 Fed. (2nd) 780, 783, in which he pointed out:

> "The Board's power to fix craft or class lines, however, by the explicit terms of the Act (Section 2, Ninth), is one which can be exercised *only as an incident to its authority to determine who is the representative of a craft or class. It is therefore only when the dispute requires an election or use of other appropriate means*, to settle this question *that the Board can fix craft or class lines* by exercising its power to designate who may participate in the election." (Emphasis ours.)

In that case the Court was considering a decision of the National Mediation Board, (Case No. R-218) in which that Board ruled as follows:

> "The authority of the Board under the provisions of Section 2, Ninth, of the Railway Labor Act to determine established crafts or classes of employees is limited to representation disputes requiring designation of employees who are eligible to participate in electing the representatives of the craft or class. Since the representative of the yardmen and switchtenders in the present case is known, acknowledged and not disputed, no election is warranted, and there is no need for designating the employee of the craft or class who may participate."

This ruling by the National Mediation Board has been considered law for more than a dozen years, and is entitled to great weight.

Louisville and N. R. Co. v. *U. S.*, 282 U. S., 740, 757.

In this case there is no question as to the identity of the representative of the brakemen's craft on the "Frisco." All parties admit that the B.R.T. is the representative. *The only question of representation involved in this case is the B.R.T.'s refusal to represent Negro members of the craft fairly, impartially, in good faith and without hostile discrimination—indeed, its refusal to represent them at all.* Respondent submits that such is not a representation dispute referable to the National Mediation Board, and this Court will not permit the B.R.T. to distort that language of the Act which gives freedom to employees to choose who shall be the representative into freedom to the representative to choose which members of the craft or class it shall represent.

Appellant Howard, at all times material herein, has been and is a passenger brakeman and the B. R. T. was under a statutory duty as collective bargaining representative under the Railway Labor Act for all men performing braking duties to give him fair representation and not to try to contract away his job rights.

The trial Court conceded that the "train porters" formed their separate organizations "actuated by motives of necessity because Negroes were not admitted to membership in the standard railroad organizations" (R. 277). The trial Court must have failed to note the record of the deposition of the Secretary of the National Mediation Board (Cole) that the fact that the "train porters" had a separate bargaining agent from the white brakemen did not constitute them a separate class or craft (R. 256, 257-258).

The mere fact that a man incidentally performs some minor duties other than those strictly within the craft or class does not take him out of the craft or class (R. 234, 236, 134, 135, 243, 284). The B. R. T. recognized the identity of class or craft in an earlier effort to gain control over the positions because:

(1) After Supplement No. 12 above had been issued the

Brotherhood requested that all colored men on passenger trains receiving brakemen's pay should be put on the same seniority list as other brakemen (R. 97-99, 100).

(2) In their case No. 3 on the strike ballot of December 21, 1945, the B. R. T. demanded that "additional brakemen covered by and paid under the respective brakemen agreements" should be used to perform the duties of brakemen now being performed by "train porters" (R. 124-125. To which we add "the same braking duties 'train porters' had been performing for time beyond memory" (R. 122).

(3) The basic agreement under which the white brakemen were working was the Agreement of March 15, 1920. The "train porters" on that date were classified as passenger brakemen under Supplement No. 12 above and had no separate agreement (R. 233.) They were therefore working under the brakemen's agreement. The only reason they did not continue to do so was because after the roads had been returned to private management on February 1, 1921, the carriers, over their protest, cut their pay and reclassified them by unilateral action from brakemen to train porters, and forced them to sign a separate agreement under duress of threat of discharge; but there was not one iota of change in their duties (R. 24, 32, 145, 151, 272).

Membership in a craft or class is determined functionally by the duties performed, not by the color of the worker's skin or his union affiliations (R. 135, 234, 284, 262-263).

Also:

Supp. No. 12, Gen. Order 27 (R. 137, 138);
Art. VI of Gen. Order 27 (R. 147).

This Court as a court of equity will regard the substance and not the form, and will not be deluded by misnomers of realities. The head-end brakemen who chance to be Negroes are none the less brakemen because they are designated "train porters". The essentials of the functions they per-

form make them members of the craft, irrespective of nomenclature. They are head-end passenger brakemen.

In *Switchmen's Union of North America* v. *National Mediation Board, et al.*, 135 F. (2d) 785 (C. of App., District of Columbia), page 793, Associate Justice Vinson (now Chief Justice of the Supreme Court of the United States) examined the meaning of the terms "craft" or "class" and concluded, "it was intended only in the occupational or functional sense. * * * " He further stated, "The term 'craft' has been defined as 'Those engaged in any trade, taken collectively.' The term 'class' has been defined as 'A group of individuals ranked together as possessing common characteristics or as having the same status.[1] The author of the bill, Mr. Eastman, explained the term 'craft or class,' as he had used it, to the Congressional Committee, as '*all* of the employees of the carrier, *no matter in what shop they were located, who did that particular kind of work.*' "[2]

Although the above case has been reversed for other reasons, the foregoing analysis is sound and remains unimpaired.

Mr. C. P. King, Assistant to the Chief Operating Officer of the "Frisco" Railway, who has been associated with the carrier for more than 36 years, testified with the greatest of frankness. The Court heard the following testimony, commencing page 233 (cross-examination by Victor Packman):

> "Q. But it is a fact that the railroad designated the job heading of train porters, isn't that so? A. Well, they had always been known by that and there was no dispute as to what it was.
>
> Q. Well, was it always during the war, the first war, when they were classified as passenger brakemen, these same men were reclassified as train porters?

---

[1] See Webster's New International Dictionary (2d ed., 1939); 10 Words and Phrases, Perm. Ed., p. 322; 7 Words and Phrases, Perm. Ed., p. 427 (compare "class" as used in the law of wills).

[2] Hearings before Committee on Interstate and Foreign Commerce on H. R. 7650, 73d Cong., 2d Sess. (1934) 57.

(Footnotes 1 and 2 are the same as the Court's numbered 24 and 31.)

A. Well, there was that interval in there when they were carried as brakemen, but I think even then in speaking of them on the railroad, they usually called them train porters. So it has been the general practice ever since I have known anything about the railroad to refer to them as train porters.

Q. Would they still be the same men irrespective of of what you called them? A. Would they still be the same men? I suppose they would.

Q. Would the work they did still be the same irrespective of what you called them? A. Well, I hardly know how to answer that question, but the fact that they were called train porters didn't change their work, if that is what you are getting at.

Q. Would it make any difference what church they belonged to if they were performing the functions of a train porter? A. None in the world.

Q. Or what organization they belong to? A. No, sir.

Q. Or what union they belong to? A. No, sir.

Q. Or which union they did not belong to? A. No.

Q. Then it is the function that makes the craft and not the man, isn't that so? A. I would say that is so.

Q. And not the label or nomenclature? A. Oh, yes, you get started to calling a machinist a machinist and it is the work he does that makes him a machinist. I suppose if you started calling him something else——

Q. (Interrupting) Suppose we called him a mechanic. Would he be any less a machinist if he were doing the work of a machinist? A. I think not."

Plaintiff submits the facts in the Record establish beyond question that plaintiff and the other Negroes known as "train porters" are brakemen in fact and the Trial Court erred in refusing to so hold. These facts also establish that the term "train porter" is merely a racial badge pinned onto the Negro brakeman by the railroad company for the purpose of exploiting them and seized upon by the Brotherhood as a pretense to eliminate them from railroad service. There is here revealed a situation comparable in all essential respects to the factual situations in the *Steele*, *Tunstall*, *Graham* and *Rolax* cases, supra. Those cases

were brought by Negro firemen against their respective employers and the Brotherhood of Locomotive Firemen and Enginemen to set aside agreements which discriminated against the Negroes on account of race and to compel the Brotherhood to represent them fairly under the Railway Labor Act—the same right which the Negro brakemen are seeking to enforce against the B. R. T. in this case. Negro firemen were known by a racial badge as "non-promotable firemen"; white firemen were known as "promotable firemen." Here the Negro brakemen are known as "train porters"; white brakemen as "brakemen." There Negro firemen and the white performed the same duties; here the Negro brakemen and the white brakemen perform the same duties. There white firemen were required to take and pass promotional examinations and Negroes were not; here Negro brakemen are required to perform a few duties in addition to their braking work. There the contracts that the Negroes attacked destroyed the rights of "non-promotable" men; here the contract of March 7, 1946, destroyed the rights of "train porters." There the jobs that were taken from "non-promotable" firemen were given to white firemen; here the braking jobs of "train porters" were to be given to white brakemen.

In the aforesaid cases, as here, the Negroes are excluded from membership in the Brotherhood representing their craft. The fact (R. 286) that Negro trainmen in this case were forced from necessity to join a racial organization which signed separate employment agreements with the carrier in which they were categorized as "train porters," does not make them any less members of the craft or brakemen.

The evidence in this cause establishes beyond doubt that respondent and the class he represents are members of the craft of brakemen employed by the carrier. It follows that since the Brotherhood is the admitted representative of that craft, it was under a duty to represent respondent and his class fairly and impartially irrespective of union mem-

bership and without regard to irrelevant factors designed to camouflage racial discrimination. As the Fourth Circuit stated in the *Tunstall* and *Rolax* opinions, supra,

> "It is clear that a bargaining agent which denies membership to Negro members of a craft which it represents cannot justify in law or in reason the use of its power to force a contract from its employer, the effect of which is to discriminate against the Negro minority which it represents. *The effect of racial discrimination is not avoided by basing it ostensibly on some other factor.* In *City of Richmond* v. *Dean*, 4 Cir., 37 F. 2d 712, we held that a zoning ordinance which in effect discriminated on grounds of race would not be upheld merely because it was based on the legal prohibition of intermarriage, which was itself based on racial grounds. So here discrimination against Negro employees cannot be sustained merely because it purports to be based on promotability, which is itself based on race." (Emphasis ours.)

We submit that the above quoted language controls the instant case, for *discrimination against Negro employees cannot be sustained merely because it purports to be based on the designation of "train porter," which is itself based on race.*

To use a homely parable: The fact that a black horse is hitched, because of color, to a bigger load than a white horse, and, because of color, receives less hay at the end of a day, and is permitted to drink only from a separate pool, does not make it any less a horse.

C. Respondent Has No Adequate Administrative Remedy

We strenuously urge that neither the National Mediation Board nor the National Railroad Adjustment Board has any jurisdiction over this cause. Nor do we see how a hearing before either of these agencies, if available, would provide an adequate remedy.

This Court has limited the doctrine of prior resort so as

to make its applicability dependent upon (1) the nature of the question to be presented and (2) the adequacy of the administrative remedy. Thus it would seem that only those questions which require the skill of administrative specialists and the exercise of specialized judgment should be placed beyond traditional judicial scrutiny and relegated for initial determination by an administrative agency.

Great Northern R. Co. v. *Merchants Elevator Co.*, 259 U. S. 285.

And where the administrative remedy is inadequate, or the failure of the court to exercise jurisdiction would result in a sacrifice or obliteration of the right involved, prior resort to the administrative agency will not be required.

Georgia v. *Pennsylvania R. Co.*, 324 U. S. 439.
Steele v. *L. & N. R. Company*, supra.

The National Mediation Board is a board of conciliation and mediation. 45 U.S.C. sec. 155). It has no powers of adjudication, except where it is called upon to determine a dispute as to representation (45 U.S.C. section 152-Ninth), or where it is called upon to interpret a collective bargaining agreement negotiated under its auspices. (45 U.S.C. section 155-Second).

Negro brakemen or other operating employees are in no position to rely on the forces of conciliation and mediation. Their numbers are so small they have no bargaining position or economic power. According to the 1940 Census, vol. III, p. 88, Table 62, there were a total of 107,432 railroad brakemen in the United States, of which 2,739 were Negroes; 43,851 locomotive firemen of whom 2,263 were Negroes.

It is futile for Negroes to invoke self-help; they must rely upon protection of Government to secure their job rights in the railroad industry. For the reasons shown above it can only be done through the judicial process in protection of rights established for them as individual workers

under the Railway Labor Act, the Federal Civil Rights Act, and the Federal Constitution.

Resort to the National Railroad Adjustment Board by respondent would merely cause respondent unnecessary delay and expense which he and the members of his class can ill afford. (Cf. Opinion of the Circ. Ct. of Appeals) (R. 339, 347-348). As already pointed out respondent claims no rights under a collective bargaining agreement for the Adjustment Board to interpret. Furthermore, the Adjustment Board is disqualified from passing on this case. It would not be an adequate administrative tribunal for adjudication of respondent's complaint even if it had jurisdiction over the issues and had the powers of a court of equity.

The Adjustment Board, down to the Railway Labor Act of 1934 was purely a creature of agreement between the carriers and their employees. The compulsive features of jurisdiction were imposed by the Act of 1934, which changed the character of the Board and its awards from the area of consent to government compulsion.

The 1934 Act sets up a permanent National Railroad Adjustment Board blanketing the industry, gives it statutory jurisdiction and makes its decision final and binding on *both parties to the dispute*, except as to a money award. Yet the Act, after designating the Board to consist of 36 members, equally divided between carriers and "labor organizations of employees, national in scope," leaves the method of selection, term, amount of compensation up to the carriers and the "national labor organizations." (Section 3).

Unorganized employees and employees outside the "national labor organizations" are given no recognition and no chance to participate in the selection of Board members. The "national labor organizations" have dominated the First Division to such an extent that the Division long refused to accept and docket a complaint from an employee unless it was brought to the Division by the employee's craft representatives.

See *Steele* v. *L. & N. R. Co.*, 323 U. S. 192, at p. 205. Monograph of the Attorney General's Committee on Administrative Procedure, Part 4: "Railway Labor, the National Railroad Adjustment Board, the National Mediation Board," at p. 7.

Twenty-five years before the contract of March 7, 1946 was executed, the Negro "trainporters" on the Frisco filed their case with the United States Railroad Labor Board seeking relief against exploitation and the arbitrary manner in which the Frisco was treating them. Decision was rendered March 5, 1924 (Decision No. 2181—R. 139-156), and the supporting opinion of Board Chairman Ben W. Hooper twenty-two years before the contract of March 7, 1946, anticipates all the arguments against sending these Negro trainmen to the National Railroad Adjustment Board. He said:

> "To give legal sanction to this discrimination certain representatives of these labor organizations have prepared and had introduced in the Congress of the United States a bill which provides that the adjustment boards which it sets up shall contain representation from the standard organizations alone. Inasmuch as these standard organizations exclude from their membership all colored men, the necessary result of the proposed measure is to legalize an ironclad act of exclusion against colored railway employees.
>
> "Whatever discriminations may be practiced by organizations of individuals they should not and cannot constitutionally be indulged in by a governmental body, legislative or administrative. These observations are made with the fullest recognition of the merits of these great labor organizations, but with a keen realization of the necessity of protecting the rights of minorities" (R. 155).

The argument Chairman Hooper made in 1924 is even more true today. The First Division of the Board which

has exclusive jurisdiction over all trainmen and brakemen is composed of 10 members: five carrier representatives and five labor representatives (R. 164). The five labor representatives come from and are officers of the following five unions, and no others:

Brotherhood of Locomotive Engineers;
Brotherhood of Locomotive Firemen & Enginemen;
Brotherhood of Railroad Trainmen;
Order of Railway Conductors;
Switchmen's Union of North America.

These labor members represent their respective unions on the Division (R. 166), and *each one of these unions bar Negroes from membership solely because of race.*

In addition the big-four Brotherhoods (BLE, BLF&E, BRT and ORC), as noted above, are on record barring the employment of Negroes as brakemen and firemen *on this particular railroad* (Memorandum Agreement of March 14, 1928, R. 59-61) (Respondent's App. pp. 1-2). The unions pay the salaries of their own representatives on the Division, and the member has no fixed term but is recallable at any time (R. 165; 45 U. S. C., sec. 153). Under the Railway Labor Act the decision of the Adjustment Board covering allocation of duties under a collective bargaining contract is *final* and not subject to judicial review (45 U. S. C., sec. 153, First—m).

It may be argued that the Court has no right to anticipate that an administrative agency will not render justice, but it is entirely unrealistic, and flaunts all the precedents in our law which hold that where the source from which the court, jury or administrative body is drawn is contaminated, one does not have to show bias in the individual officer, but the entire panel is thrown out; and proceedings before it after challenge made and proved is *coram non judice*. Be it noted there is no provision in the Act for substitution of members.

It is therefore apparent that the First Division of the

Adjustment Board set up by Statute in outline only and manned by members fifty percent selected by and from national labor unions barring Negroes from membership and with persistent anti-Negro records, cannot be permitted to be a "kangaroo court" sitting on and deciding cases adversely affecting the job rights of these outlawed Negro workers for the direct benefit of one or more of the unions represented on the Division. The action of the Division under such circumstances becomes prohibited governmental action which neither the members of the B.R.T. nor the carrier can claim the benefit of.

We submit, moreover, that the fact the Brotherhood of Railroad Trainmen's representative is paid by his union and subject to recall at will gives him a *direct interest* in the controversy so as to disqualify him within the meaning of *Tumey* v. *Ohio*, 273 U. S. 510. And since the Act requires all the members of the Division to participate in the decision and makes no provision for alternate or substitute members, the disqualification of the B.R.T. stymies the entire Division and it must grind to a halt without deciding a case which never should be brought before it (45 U. S. C., sec. 153). *Cf. O.R.C.* v. *Swan*, 329 U.S. 520.

This Court in the *Steele* case took judicial notice of the inadequacy of the Adjustment Board to give constitutional "due process" in cases of this kind.

We quote from 89 L. ed. 185:

> ". . . Further, since Sect. 3, First (c) permits the national labor organizations chosen by the majority of the crafts to 'prescribe the rules under which the labor members of the Adjustment Board shall be selected' and to 'select such members and designate the division on which each member shall serve,' *the negro firemen would be required to appear before a group which is in in large part chosen by the respondents against whom their real complaint is made.* In addition Sect. 3, Second provides that a carrier and a class or craft of em-

ployees, 'all acting through their representatives, selected in accordance with the provisions of this Act,' may agree to the establishment of a regional board of adjustment for the purpose of adjusting disputes of the type which may be brought before the Adjustment Board. In this way the carrier and the representative against whom the negro firemen have complained have power to supersede entirely the Adjustment Board's procedure and to create a tribunal of their own selection to interpret and apply the agreements now complained of to which they are the only parties. *We cannot say that a hearing, if available, before either of these tribunals would constitute an adequate administrative remedy.* Cf. Tumey v. Ohio, 273 U.S. 510, 71 L. Ed. 749, 47 S. Ct. 437, 50 A.L.R. 1243." (Emphasis ours.)

In spite of the restrictions placed by the Railway Labor Act of June 21, 1934 on judicial relief, this Court has nevertheless been able to take jurisdiction to protect minority workers whose individual rights are opposed by the dominant railway labor union in the area of controversy.

Elgin, Joliet & Eastern R. Co. v. *Burley*, 325 U. S. 711;
Steele v. *L. & N. R. Co.*, 323 U. S. 192;
Tunstall v. *L. & N. R. Co.*, 323 U. S. 210;
Graham v. *Brotherhood of Locomotive Firemen and Enginemen*, 328 U. S. 232, 94 L. Ed. 22;
Cf. Moore v. *Illinois Central R. Co.*, 312 U. S. 630.

Even the cases which restrict judicial relief provide that where constitutional considerations are involved, or there is a threatened sacrifice or obliteration of a right created by Congress to protect the interests of individuals or the public, a court of equity can intervene.

Switchmen's Union of N.A. v. *National Mediation Board*, 320 U. S. 297, 300-301;
Order of Railway Conductors v. *Pitney*, 326 U. S. 561, 566.

In the instant case the constitutional guaranty of due process is involved in forcing the Negro head-end passenger brakemen (called "trainporters" because of color) to submit their complaint to the First Division of the National Railroad Adjustment Board for a definitive interpretation of their agreement and employment relation with the carrier in their claim to continue performing the head-end braking functions on respondent carrier's passenger trains.

Respondent attaches Exhibit VIII in his appendix hereto, and asks the Court to take judicial knowledge thereof as a public document filed with a Federal agency under the Railway Labor Act,[1] of the rules adopted by the Railway Labor Executives Association in 1934 governing the selection and assignment of the labor members of the National Railroad Adjustment Board. These Rules show that the only labor organizations which can place members on the First Division are the five operating unions—all of which exclude Negroes from membership and four of which (Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen & Enginemen, Brotherhood of Railroad Trainmen and Order of Railway Conductors) have a record of persistent hostility to the use of Negroes as brakemen or firemen on *this very carrier* property.

---

[1] Exhibits A and B hereto are taken from the files of the National Mediation Board and certified correct under its seal and the signature of its Secretary. Section 5 Third (f) of the Railway Labor Act, 45 U.S.C. sec. Third (f), provides:

"When any new contract is executed or change is made in an existing contract with any class or craft of its employees covering rates of pay, rules, or working conditions, or in those rates of pay, rules and working conditions of employees not covered by contract, the carrier shall file the same with the Mediation Board within thirty days after such new contract or change in existing contract has been executed or rates of pay, rules, and working conditions have been made effective."

In practice this has been construed by the industry as requiring the filing with the National Mediation Board of all rules and regulations adopted under the Railway Labor Act governing the working conditions of employees, as well as formal agreements.

In addition, respondent attaches Exhibit IX which brings the case directly within the text of *Steele* v. *L. & N. R. Co.*, 323 U. S. 192 at p. 206. Exhibit IX which respondent asks the Court to take judicial notice of shows that May 19, 1949 the five operating unions and the three regional carriers' committees for the National Railroad Adjustment Board made an agreement to establish two supplemental boards of four men each to relieve the congestion of cases before the First Division, to take over any cases which might be assigned them by the First Division under the Railway Labor Act section 3 First (w), 45 U.S.C. Section 153 First (w). Labor representation on these two supplemental boards is

> (1) on the first supplemental board: the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen & Enginemen
>
> (2) on the second supplemental board: the Order of Railway Conductors and the Brotherhood of Railroad Trainmen.

Since this dispute involves braking functions, the Negro trainporters would be sent to the second supplemental board. This brings the Steele case into play because

> "... the carrier and the representative against whom the Negro firemen have complained have power to supersede entirely the Adjustment Board's procedure and to create a tribunal of their own selection to interpret and apply the agreements now complained of to which they are the only parties. We cannot say that a hearing, if available, before either of these tribunals would constitute an adequate administrative remedy. *Cf. Tumey* v. *Ohio*, 273 U.S. 510, 71 L. ed. 749, 47 S. Ct. 437, 50 A.L.R. 1243" (loc. cited at p. 206).

It is respectfully submitted that rights under the Railway Labor Act, the due process clause of the Fifth Amendment to the Federal Constitution, and the Federal Civil Rights Act (8 U.S.C. sec. 41) would be sacrificed and obliterated if

the Negro head-end passenger brakemen (trainporters) had to submit their right to continue in their common calling and to continue to perform their present braking duties on the head-end of the Frisco's passenger trains to either the First Division or the supplemental boards. If such an imposition would not obliterate the constitutional and civil rights mentioned, then Negro operating employees must resign themselves to be eliminated from railroad service under abuse of government authority.

II. THE RIGHT TO WORK

A. The B.R.T. May Not Use Its Statutory Position and Power to Deprive Respondent of His Right to Work

Mr. Justice Field in *Butchers Union Co.* v. *Crescent City Co.*, 111 U. S. 746, 756-757, stated:

> "As in our intercourse with our fellowmen certain principles of morality are assumed to exist, without which society would be impossible, so certain inherent rights lie at the foundation of all action, and upon a recognition of them alone can free institutions be maintained. These inherent rights have never been more happily expressed than in the Declaration of Independence, . . .
>
> "Among these inalienable rights, as proclaimed in that great document, is the right of men to pursue their happiness, by which is meant the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others. . . .
>
> "The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same conditions. . . .
>
> "It has been well said that, 'The property which every man has is his own labor, as it is the original

foundation of all other property, so it is the most sacred and inviolable. *The patrimony of the poor man lies in the strength and dexterity of his own hands, and to hinder his employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property.' . . .* Adam Smith's Wealth of Nations, Bk. I, Chap. 10." (Emphasis ours.)

See also: *Truax* v. *Raich, supra; Nord* v. *Griffin, supra.*

In *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229, 251, this Court redeclared:

". . . The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others. The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion, and, by the weight of authority, the unjustified interference of third persons is actionable although the employment is at will."

In *Central Metal Products Corporation* v. *O'Brien,* 278 Fed. 827, the court considered an application for a preliminary injunction directed against officers of a union who had threatened to call a strike on a certain project unless the plaintiff would discharge certain carpenters and hire others who were members of the sheet metal union. The court issued a temporary injunction and stated that the means resorted to to carry out the conspiracy were unlawful. It stated: ". . . it is settled law that one may not induce or persuade, *much less coerce,* one to break his contract with another."

Discriminations because of race or color in the area of governmental action have been declared to be based on irrelevant and invidious distinctions and have been stricken down as violating public policy, the Federal Civil

Rights Act and the due process clause of the Fifth or Fourteenth Amendments, dependent on whether the action was federal or state.

Steele v. *L. & N. R. Co.*, 323 U. S. 192;
Kerr v. *Pratt Library*, 149 F. 2d 212.

The principle of public policy against racial discriminations does not depend on the narrow issue of identity of craft or class but sweeps the entire range of governmental action in the broadest sense.

The fact that a statutory bargaining agent violates a fiduciary obligation in not fairly representing minority members of the craft is one point. We will deal with that elsewhere. But the graver sin is in the impairment by a governmental instrumentality of rights which not even Congress can legitimately abridge or deny.

Steele v. *L. & N. R. Co.*, *supra;*
Hurd v. *Hodge*, 334 U. S. 24, 92 L. ed. 1187;
Nixon v. *Condon*, 286 U. S. 73, 88, 89, 76 L. ed. 984, 990;
Smith v. *Allwright*, 321 U. S. 649, 662;
Kerr v. *Pratt Library*, *supra;*
James v. *Marinship Corp.*, 155 P. 2d 992 (Cal. App.);
Williams v. *International Boilermakers*, 165 P. 2d 212 (Cal. App.).

Respondent suggests to the Court that, apart from the question of class or craft, the collective bargaining representative may not use its federal statutory position and power to deprive citizens of the United States of their constitutionally protected right to work and, by a strike threat coerce an employer to discharge an employee solely because of his race or color.

Cf. Opinion of the Circ. Ct. of Appeals herein (R. 339, 345)

This Court held in the *Steele* case:

"Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body * * *" (323 U. S. 192, 202).

It is respectfully urged that when the representative exercises that power it exercises the power of Government and may not use it in violation of the Constitution, laws and public policy of the United States.

As an integral part of the statutory scheme for the regulation of commerce, Congress conferred upon labor unions broad legislative powers. Certainly it did not and, constitutionally, could not grant them unbridled freedom to bar citizens on the ground of their race or color from positions within the craft. To the extent that the representative participates in collective bargaining as a statutory representative under the Railway Labor Act, it exercises a power that is conferred, defined, regulated and protected by the statute; and would appear to be just as much a governmental agency as the Democratic Party of Texas, which was empowered by Texas statute to prescribe qualifications for membership, and which this Court held to be an agent of the State when exercising its State-conferred powers.

Nixon v. *Condon*, 286 U.S. 73 (1932)

This Court has also held that the action of a political party in conducting a primary election for either Congressmen or state officials is state action where that primary is an integral part of the state machinery for election.

Smith v. *Allwright*, 321 U.S. 649 (1944)

The actions of a labor organization in functioning as a collective bargaining representative under the Railway Labor Act should be no less governmental action where that function is an integral part of the Congressional scheme for the regulation of commerce.

B. The Right to Strike Is Not Absolute

The right of a labor union to strike is qualified. Interference without just cause with the right to carry on business is unlawful.

Dorchy v. *Kansas*, 272 U.S. 306

Whether a strike is lawful or not depends on its purpose as well as the means employed. It must be exercised with due regards to the rights of others.

See, Mason, "The Right to Strike," Univ. of Pennsylvania Law Review, Vol. 77, pp. 52, et seq.

It cannot be argued in good faith by petitioners that the coercion by the B.R.T. (even though not consummated in a strike because the carrier yielded to the strike threat) did not have for its object and purpose the displacement of the Negro workers and the substitution of white workers for them. Neither can they deny the realization of the inevitable result of their conduct nor deny their responsibility for its consequences.

Barr v. *Essex Trades Council*, 53 N. J. Eq., 101, 30 Atl. 881

Where there is both a legal and an illegal purpose, the action is illegal.

Bausch Machine Tool Co. v. *Hill*, 231 Mass. 30, 36

The racial aspects of petitioners' motivation contaminate whatever incidental or other motives which may have induced the B.R.T. to resort to strike threats.

> "Motive is a persuasive interpreter of equivocal conduct, and petitioners are not entitled to complain because their activities were viewed in the light of manifest interest and purposes." (Chief Justice Hughes in *Texas & N. O. R. Co.* v. *Brotherhood of Ry. & S. S. Clerks*, 281 U. S. 458.)
> See also: *Hunter* v. *A. T. & S. F. R. Co.*, 171 F. 2d 594, 597

In *Wills* v. *Restaurant Employees*, 26 Ohio N. P. (N.S.) 435 (1927), the court issued an injunction where a white union fostered a boycott of a restaurant employing Negro

waiters who were barred from membership in the union. In issuing the injunction the court recognized that it was not a case of mere unionism but one "of white men opposing colored men."

See also: *Bautista* v. *Jones*, 25 Cal. (2d) 746, 155 P. (2d) 343

Every set of circumstances must be considered separately in determining whether a strike can be justified, and union ambition is not the sole standard. *Individuals* still have rights which courts have and will vindicate and protect against powerful economic combines using their statutory strength for illegitimate purposes; and, under the Constitution, one of the most sacred of these individual rights is the right to work.

III. THE NORRIS-LaGUARDIA ACT IS INAPPLICABLE

Petitioners urge for the first time[1] that the Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C., Section 101, et seq., deprives the Federal Court of jurisdiction to award the injunctive relief granted by the Court below. Respondent submits that such a proposition is not only *incompatible with the purpose of the Act* but also flies in the face of controlling decisions of this Court. This Act constituted a great advancement for the cause of labor, but it would be a pyrrhic victory indeed if it should be construed to deprive employees of an injunctive remedy to avert irreparable injury caused by the violation of other rights conferred upon them by subsequent labor legislation or of civil rights protected by the Constitution. That no such anamolous construction should be indulged in is plain in principle and has been so declared by this Court.

[1] No hint to that effect was urged before the trial court, nor was the Petitioner an exceptor to the Order made therein, or a cross appellant.

Respondent has alleged that the Brotherhood and the Railroad had violated mandatory duties imposed upon them by the Railway Labor Act and interfered with a basic *personal* right to maintain the means of a legitimate livelihood. In the case of *Virginian Railway Co., supra,* this Court held that the Norris-LaGuardia Act does not apply to an injunction to enforce such rights, and that the mandatory provisions of the Railway Labor Act ". . . cannot be rendered nugatory by the earlier and more general provisions of the Norris-LaGuardia Act." (300 U. S. 515 at 563). In *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen, supra,* the union, as here, attempted to avoid the full effects of the *Steele* and *Tunstall* decisions, *supra,* by contending, as they do now, that the Norris-LaGuardia Act operates to restrain federal courts from issuing injunctions to enforce the obligation to represent all members of the craft fairly. However, this Court, in clear and unmistakable language, expressly held the provisions of the Norris-LaGuardia Act inapplicable to a suit for injunctive relief against discriminatory representation by the statutory bargaining agent. The following excerpt is particularly pertinent to the instant case:

> "Nor does the Norris-LaGuardia Act contain anything to suggest that it would deprive these Negro firemen of recourse to equitable relief from illegal discriminatory representation by which there would be taken from them their seniority and ultimately their jobs. Conversely there is nothing to suggest that, in enacting the subsequent Railway Labor Act provisions insuring petitioners' right to nondiscriminatory representation by their bargaining agent, Congress intended to hold out to them an illusory right for which it was denying them a remedy. If in spite of the *Virginian, Steele* and *Tunstall* cases (US) all *supra,* there remains any illusion that under the Norris-LaGuardia Act the federal courts are powerless to enforce these rights, we dispel it now. The District Court has jurisdiction to enforce by injunction petitioners' rights to non-discrim-

inatory representation by their statutory representative." 338 U.S. 232 at 239.

Also see:

Brotherhood of Railroad Trainmen v. *Templeton*, 181 F. (2d) 527, 533;
Hunter v. *Atchison, Topeka & Santa Fe Ry. Co.*, 171 F. (2d) 594, 596;
M. K. T. Ry. Co. v. *Brotherhood of Ry. & S. S. Clerks*, 188 F. (2d) 302, 305.

IV. CONCLUSION

Mr. Justice Stone of this Court in *Virginian Railway Co.* v. *System Federation* No. 40, 300 U.S. 515, 551, states:

> "The extent to which equity will go to give relief where there is no adequate remedy at law is not a matter of fixed rule. It rests rather in the sound discretion of the Court."

Respondent submits that the decision of the Circuit Court of Appeals is founded on reason and established law and that the result reached protects the rights of all parties. There was ample factual bases to justify the result reached although the decision could well have been to the same effect for other and additional reasons such as have been presented in this brief.

The informed judgment of the Circuit Court of Appeals, exercised with a view of all relevant circumstances, and based upon the particular facts and their analysis, is entitled to great weight; and except for strong and impelling reasons this Court will not interfere with its actions.

Meccana v. *Wanamaker*, 253 U.S. 136, 64 L. Ed. 822.

The abuse of federal statutory power and disregard of statutory obligation by the B. R. T. in this case and the use of its position to discriminate against Negro railway workers, solely because of their race or color, cannot be ignored.

A decision from this Court upholding the result reached by the Circuit Court of Appeals will give strength and courage to individual workers everywhere, arising from the knowledge that their rights to a livelihood are protected by Courts from unfair and discriminatory conduct based on race.

Respectfully submitted,

VICTOR PACKMAN
JOSEPH C. WADDY
Counsel for Respondents

HENRY D. ESPY,
WILLIAM C. GARDNER,
Of Counsel.

APPENDIX

APPENDIX

EXHIBIT I (R. 59-61)

Morey Exhibit A

Memorandum of Understanding of Responsibility for and Duties Under an Agreement Made Between the Four Train Service Organizations and the St. Louis-San Francisco Railway Company

The four train service organizations have insisted and demanded for several years that St. Louis-San Francisco Railway Company have an understanding with them that in the future the Company would not employ any more Negroes in train, engine and yard service, but not including train porters. This demand and request upon the part of the organizations has been based upon the allegation that colored firemen under arrangements prevent and make almost impossible opportunity for the training of white firemen to become engineers and limit their opporunities so to do; that colored employes cannot render the intelligent service necessary to safe operation in train, engine and yard service; that constant friction and irritation arises out of the whole situation and various other reasons.

The Railway Company has made known to the Organizations their very real apprehension and fears that in the event such an agreement was made the Negroes in train, engine and yard service now in the employ of the Company, would be either intimidated, threatened or coerced into abandoning their positions or through indirect methods of false charges, repeated complaints, alleged infractions of rules, etc., would be driven from the service of the Company.

The responsibility for proposing and urging this agreement is fully assumed by the four train service organizations. The four train service organizations acknowledge and fully recognize the right of Negroes now in the employ of the Company to the positions to which they are entitled under schedule rules and their right to fill these positions under fair and honest conditions without unfair action of any character being taken by the members of those organizations directly or indirectly for the purpose of compelling the abandoning of these positions or their elimination from employment. The four train service organizations undertake that they can and will see to it that neither by nor

through their membership is any advantage taken of this agreement in order to compel the abandonment of the positions now held by Negro employes; that on the contrary, realizing the position of the management and their own assumption of responsibility, they will put forth every effort to see that conditions feared by the management shall not occur. It is the good faith of all parties that the present Negro employes shall have fair and equal rights to remain in their positions, subject, of course, to the same measures of discipline and entitled to same impartiality of dealing.

Both parties shall co-operate together and use their best endeavors to carry this agreement into effect. In event that a situation shall arise which demonstrates lack of safety for colored employes or of unfair dealings with them this matter shall promptly be taken up with the train service organizations for the purpose of prompt and efficient prevention and correction. If it can be fairly shown thereafter that such conditions continue to exist then the Management reserves the right to hold itself released from the understanding entered into.

In accordance with the above it is agreed that effective March 14, 1928, in the future hiring of employes in train, engine and yard service but not including train porters, only white men shall be employed.

(Sgd) J. W. BOWLER
General Chairman, B. of L. E.

(Sgd) E. H. KRUSE
Ass't Grand Chief Engineer, B. L. E.

(Sgd) OTIS EMBRY
General Chairman, B. of L. F. & E.

(Sgd) FRED W. LEWIS
Vice President, B. of L. F. & E.

(Sgd) L. S. THOMPSON
General Chairman, O. R. C.

(Sgd) J. A. GANNON
Vice President, O. R. C.

(Sgd) F. W. MOREY
General Chairman B. of R. T.

(Sgd) S. R. HARVEY
Vice President, B. of R. T.

(Sgd) J. E. HUTCHISON
Vice President—St. Louis & San Francisco Ry.

Witness—March 14, 1928.

EDWIN P. MORROW
Member Board of Mediation

EXHIBIT II (R. 107-108)

(Plaintiff's Exhibit 22.)*

"I hand you herewith copy of agreement made with the organizations relative to Case No. 5, which has to do with employment of Negroes as firemen, brakemen and switchmen on the lines south of Memphis.

This agreement was dictated by Federal Mediator Morrow and as you will note it is signed by everybody concerned.

This means that we must not hire any more Negro employes. These that are with us are to stay, but when we need new men we will hire white men.

You should not give this any publicity at all. You should just simply call in your men who are charged with this duty and tell them what they are to do and whenever there is a change in officers that employ men in that territory they must be very carefully instructed. There must be no failure to carry out this matter.

If there might have been any Negroes employed in these capacities on yesterday, March 14th, today, March 15th, or any day up to the time that you can get these instructions out, such employes should be dispensed with.

I want to carry this out in good faith and then we want to see that the men carry out their agreement with us in good faith. If there is any attempt to intimidate, terrorize, or in any way get rid of these employes, we should be advised quickly so that we can take proper action.

Wish you would give me your personal acknowledgment and I wish you would personally see that instructions in this matter are very carefully carried out. This is something that can be handled successfully if we go about it in the right way or it can result in very bad state of affairs if it is handled without discretion.

(Signed) J. E. HUTCHISON."

---

* Letter dated March 15, 1928, to F. H. Shaffer, general manager, and H. L. Worman, superintendent of motive power, from J. E. Hutchison, vice president of St. Louis, San Francisco Railway Co.

EXHIBIT III

Memorandum on Discriminations Against Negro Railway Workers by Brotherhood of Railroad Trainmen *

1883.—The Brotherhood of Railroad Trainmen was organized in 1883 as the Brotherhood of Railroad Brakemen of the Western Hemisphere, and so continued until 1886.

1884.—The first annual convention of the organization in 1884 adopted a constitutional provision restricting membership to "whites" only.

1886.—From 1886 to 1889 the organization was known as the Brotherhood of Railroad Brakemen.

1890.—The present name of the organization: Brotherhood of Railroad Trainmen was adopted in 1890.

The Brotherhood of Railroad Trainmen by constitution still exclude Negroes from membership in all Southern States.

1898.—In 1898 Grand Master Morrissey and the General Grievance Committee, Brotherhood of Railroad Trainmen, on the entire Missouri Pacific System met management of the system in an effort to effect the removal of the Negro brakemen on the entire system (Proceedings, Fourth Biennial Convention, 1899, p. 19).

1899.—In 1899 the general grievance committee of the Brotherhood of Railroad Trainmen, together with A. B. Youngson of the Brotherhood of Locomotive Engineers, F. P. Sargent of the Brotherhood of Locomotive Firemen and Enginemen, E. C. Clark of the Order of Railway Conductors, and W. V. Powell of the Order of Railroad Telegraphers and the committees of the five organizations negotiated an agreement with the Gulf, Colorado and Santa Fe Railway on displacing colored porters on passenger trains and white brakemen being placed in these positions (Report

---

* Reprint from Hearing before a Special Subcommittee of the Committee on Education and Labor, House of Representatives, 81st Congress, on H. R. 4453 and companion bills to prohibit discrimination in employment, etc., pp. 214-217. Hearings held May, 1949.

of Grand Master Morrissey, Fifth Biennial Convention, Milwaukee, 1901, p. 10).

1899.—The Fourth Biennial Convention of the Brotherhood of Railroad Trainmen at New Orleans, 1899, commended Grand Master Morrissey's efforts in 1898 to have Negro brakemen replaced by whites in certain railroads (proceedings, pp. 19 and 72).

1899.—The Fourth Biennial Convention above protested the employment of Negroes on all railway trains and requested the Order of Railway Conductors, Brotherhood of Locomotive Firemen, Brotherhood of Locomotive Engineers and the Order of Railroad Telegraphers to give their support toward clearing the lines of Negro workmen (proceedings, pp. 59-60).

1901.—Second Vice Grand Master Dodge reported to the Fifth Biennial Convention at Milwaukee, 1901, that some of the lodges have succeeded, to a great extent, in having the Negro taken off trains, and the men of the South are using their utmost efforts to have the Negro taken from the service (proceedings, p. 12).

1905.—In 1905 the Brotherhood of Railroad Trainmen committee negotiated an agreement with the Norfolk & Western R. Co. that no more Negroes would be hired as brakemen for road service.

1910.—July 2, 1910, the Brotherhood of Railroad Trainmen and Order of Railway Conductors Southern Association of General Committees negotiated the "Washington agreement with the Southern Railway Co., Atlantic Coast Line R. Co., Seaboard Air Line R. Co., and other southern roads providing that Negroes were not to be employed as baggagemen, flagmen, or yard foremen; where Negroes held such positions at the time of making the contract, any vacancies in such position should be filled by whites (report of Vice President Val Fitzpatrick, 10th biennial convention, Harrisburg, 1911; pp. 445-449).

1911.—The tenth biennial convention, Brotherhood of

Railroad Trainmen, at Harrisburg, Pa., 1911, adopted a resolution that railroads should employ only promotable men in train and yard service (proceedings, pp. 175-176).

1911—The Brotherhood of Railroad Trainmen committee February 2, 1911, negotiated an agreement with the Florida East Coast R. Co. that no more Negroes would be employed in train or yard service, pursuant to contract effective November 1, 1910 (report of President Lee, 11th biennial convention, San Francisco, 1913, p. 25).

1911.—The Brotherhood of Railroad Trainmen committee March 15, 1911, negotiated an agreement that no more Negroes were to be employed as yard conductors, baggagemen, or flagmen, and the percentage of Negro train or yardmen employed should not exceed the percentage in service July 1, 1910 (report of Vice President Fitzpatrick, 11th biennial convention, pp. 117-118).

1911.—The Southern Association of General Committees of the Order of Railway Conductors and Brotherhood of Railroad Trainmen June 30, 1911, negotiated an agreement with Cincinnati, N. O. & Texas Pacific and Alabama Great Southern Ry.; Central of Georgia; Mobile & Ohio and Southern Ry. of Mississippi; Georgia, Southern & Florida R.; New Orleans & Northeastern, Alabama & Vicksburg, Ry., and Vicksburg, Shreveport & Pacific Ry.; Southern Ry. and Virginia & Southwestern Ry.; Atlantic Coast Line, that when Negroes who perform work as flagmen, or Negro foremen become separated from the service, their places would be filled by white men (report of President Lee, 11th biennial convention, pp. 50-54).

1913.—The Brotherhood of Railroad Trainmen committee negotiated an agreement with the Norfolk Southern Ry. Co. February 1913, that the percentage of colored trainmen will not be increased (report of Vice President Val Fitzpatrick for 1913, p. 204).

1914.—The general committee of the Brotherhood of Railroad Trainmen in 1914 was able to displace 14 Negro brake-

men with white brakemen on the Gulf, Colorado & Santa Fe Railway (circular of instructions, C-13, August 1914, Railroad Trainmen's magazine, September 1914, p. 831).

1914. The Brotherhood of Railroad Trainmen committee was successful in 1914 in placing 13 white flagmen on passenger runs on the St. Louis-San Francisco, displacing Negroes (report of President Lee for 1914, p. 541; St. Louis-San Francisco Railroad—file 5332).

1914.—On or about May 15, 1914, Val Fitzpatrick, vice president and national legislative representative, B. R. T., joined with P. J. McNamara, vice president, B. of L. F. & E., H. W. Wills, assistant grand chief engineer, B. L. E., and W. M. Clark, vice president, Order of Railway Conductors in writing the letter to Col. George W. Goethals set out in full as exhibit 1 hereto attached (Report on National Legislation, 63d Cong., 1914, by the national legislative representatives of the B. L. E. of L. F. & E., O. R. C. and B. R. T., December 1, 1914, to their organizations).

1915.—The general grievance committee, Brotherhood of Railroad Trainmen, for the Georgia Southern & Florida Railway, February 1915, although there was no breach of article 1 of the Washington agreement, secured the displacement of six Negro brakemen and replaced them with white brakemen. (Report of assistant to the president, T. R. Dodge, officers reports for 1915, p. 1135; Railroad Trainmen's Magazine, March 1915, p. 292.)

1915.—Assistant to the president, T. R. Dodge, Brotherhood of Railroad Trainmen, in conjunction with Vice President Turner, Order of Railway Conductors, met in 1915 with the joint general committees for the Cleveland, Cincinnati, Chicago & St. Louis Railway, and negotiated with management with result five colored trainmen on Chicago and St. Louis divisions were removed and white trainmen put in their positions. (Circular of Instruction C-28, November 1915; Railroad Trainmen's Magazine, December 1915, p. 1140.)

1916.—The First Triennial Convention, Brotherhood of Railroad Trainmen, at Detroit, Mich., in 1916, adopted a resolution instructing the general chairmen on the Southeastern territory to use every means of the brotherhood to get white men the right to work on the front end (proceedings, p. 95).

1917.—An editorial in Railroad Trainmen's Magazine (October 1917, pp. 733-734) commended the Brotherhood of Locomotive Engineers and Brotherhood of Locomotive Firemen and Enginemen for resisting the efforts of the Baltimore & Ohio to hire Negro firemen during the war emergency.

1917.—The Brotherhood of Railroad Trainmen committee, together with the committees of the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen and Order of Railway Conductors, obtained the assignment of three white brakemen to a dodger crew on the Texas & Pacific Railway (file 6429) formerly manned by Negro brakemen (Circular of Instructions D-14, September 1917; Railroad Trainmen's Magazine, October 1917, p. 727.

1917.—The general grievance committee, Brotherhood of Railroad Trainmen, for Seaboard Air Line Railway (file 6642) negotiated an agreement with the carrier in 1917 restricting the employment of Negro trainmen when normal conditions prevail.

1919.—The Second Triennial Convention, Brotherhood of Railroad Trainmen, at Columbus, Ohio, in 1919, adopted a resolution calling for all general committees to incorporate into the schedule on each line of railroad a rule that no more non-promotable men will be employed; and that the practice of using train porters to perform the duties of baggagemen, flagmen, or brakemen be discontinued (proceedings, pp. 229-230).

1919.—The second triennial convention above adopted a resolution demanding that the Director General of Railroads

restore the right of the Brotherhood of Railroad Trainmen "to make percentage agreements guaranteeing the Brotherhood of Railroad Trainmen a majority of men so employed, to the end that contracts made by this organization may be protected by it" (proceedings, p. 315).

1919.—In July, 1919, the Brotherhood of Railroad Trainmen advised Regional Director Winchell it was the desire of the Brotherhood to execute an agreement that would operate to prevent the employment of Negroes in train and yard service (proceedings, second triennial convention, 1922, pp. 172-175).

1919.—On March 1, 1919, the general committee, Brotherhood of Railroad Trainmen, Southern Railroad negotiated an agreement for removal of all Negro foremen in yard service at Chattanooga (report of President Lee for 1919, p. 73, Railroad Trainmen Magazine, May, 1919, p. 356).

1920.—The general grievance committee, Brotherhood of Railroad Trainmen, for Norfolk & Portsmouth Belt Line Railroad, April 2 and 3, 1920, negotiated an agreement reducing the employment of Negro trainmen from 33 percent to 30 percent, which protected the positions then held by white trainmen (report of President Lee for 1920, p. 106).

1928.—The Brotherhood of Railroad Trainmen did not give the Negro firemen or trainmen on the St. Louis-San Francisco Railway or its predecessor corporations property any notice or opportunity to be heard at any stage of the negotiations which resulted in the contract of March 14, 1928, prohibiting future hiring of Negroes in train, engine or yard service.

1943.—The Brotherhood of Railroad Trainmen general grievance committee on the St. Louis-San Francisco Railroad Co. through its chairman protested the proposal of the carrier to hire Negro trainmen during World War II, as a breach of the March 14, 1928, agreement.

* * * * * * * * * * *

1931.—The Sixth Triennial Convention, Brotherhood of

Railroad Trainmen, at Houston, Tex., 1931, adopted a resolution empowering the president of the grand lodge to assign a grand lodge officer to assist the general committees in an effort to have the Negro train porters removed (proceedings, pp 632-633).

1940 to date.—In the 1940's the Brotherhood of Railroad Trainmen has been conducting a drive on the Southwestern railroads (Missouri Pacific, M-K-T; Atchison, Topeka & Santa Fe; St. Louis-San Francisco Railway) to take away from Negroes classified as "train porters" all the head-end braking work on passenger trains which they have been doing with BRT knowledge for more than 40 years and have this head-end braking work taken over by white brakemen (most of whom are BRT members).

EXHIBIT IV (R. 110)

(Plaintiff's Exhibit 27.)

"Returning enclosures received with your personal April 12th relative to letter addressed to Mr. Kurn signed by Limit Brown, Jim Judge and Abe Smith, Memphis.

These men are all colored brakemen on the Southern Division south of Memphis and they have reference to the proposition of our not hiring any more colored trainmen, except train porters.

We, of course, put out our information in connection with this matter very quietly, but apparently the Chairmen published the information as soon as they got back to their divisions, and a delegation of colored brakemen called on Superintendent Butler, who told them there would be no change in the method of handling those who are now employed and nothing whatever would interfere with their future employment so long as they performed their work in a satisfactory manner.

Mr. Sisson also talked to a couple of the colored firemen

and they had about the same complaint, however, he told them there would be no change in the method of handling them, except that no new colored men would be employed.

(Signed) F. H. SHAFFER,
General Manager."

EXHIBIT V (R. 111)

Mr. Packman: I will read the letter, date of 4/14/1928. (Plaintiff's Exhibit 25.)

"Mr. J. E. Hutchinson. Vice President of St. L. and SF R.R.

Dear Sir:

We the undersigned Colored freight brakemen are the humble and submissive voices of the colored brakemen of the Tupelo and Birmingham Sub. Div. wish to petition your *majesty* to meet you in a conference to ascertain why and what accusations you have against us and our posterity to cast us off in old age after serving you most faithfully for over a decade and almost half our lives.

Dear Mr. Hutchinson, If it be possible for us to remedy such an accusation we are more than willing to do all there is in our power to remove the obstacles which hinder the free and embarrassed actions of those about us, thanking you in advance for any consideration you may give us, we beg to remain your servants for ever.

'LIMIT BROWN,' Gen. Chr. 17 yrs. service.

'ABE SMITH.'"

EXHIBIT VI (R. 112)

Mr. Packman: Another letter from Mr. J. E. Hutchison under date of April 19, 1928, our Exhibit No. 28. I am reading now.

(Plaintiff's Exhibit 28.)

"Limit Brown,
1295 Edith Street,
Memphis, Tenn.

I have your letter of April 14th.

It has been decided that we will not employ any more colored men as brakemen, switchmen, or firemen. All of the colored men that now hold these places will be retained in these places as long as they live or are able to do the work and comply with the rules, but as they drop out from natural causes they will be replaced with white men."

EXHIBIT VII (R. 112-113)

(Plaintiff's Exhibit 29.)

"Mr. J. E. Hutchison,
Vice-President, St. L. & SF. R. R.

Dear Sir:

After much prayerfull consideration with reference to your letter of Apr. 19, we read with much regret that decision outlined in your first sentence. There are many things to be regreted in this decision, one which we would like to call to your attention to.

First of all there is reasonable ground for your local officials to lose interest in us, because in the first place they feel you have: which will make it very difficult for us to stay in the services. However, We are grateful to know that we will be retained as outlined in sentence two. But: Dear Mr. Hutchison, the first and last sentences so far out-

weigh, sentence two, untill it leaves our hearts in pain. We know that we cannot compete with the powers that be. We would far more rather you to have deducted our salaries than to eliminated us from the employment of this great industry.

Therefore Mr. Hutchison, if it be possible and pleases you our only human salvation, We are humbly asking you, please do not close this great industrial door in the black man's face who is the least of all the inhabitants of the earth. We are thanking you in advance for any consideration you may give us because we are depending absolutely upon you for our restoration. We will be pleased with whatever you do to restore us. Because we believe as thou art a husband and father, you will do justice for us.

We beg to remain your servants as ever.

Yours Respectfully,

'LIMIT BROWN, BK.man.'"

EXHIBIT VIII

"Rules to Govern the Selection of Labor Members of the National Railroad Adjustment Board provided for in the Amended Railway Labor Act, Effective June 21, 1934."

NATIONAL MEDIATION BOARD
WASHINGTON

CERTIFICATION

To Whom It May Concern:

I, Thomas E. Bickers, Secretary of the National Mediation Board, do hereby certify that the attached copy of document described as follows:

"Rules to Govern the Selection of Labor Members of the National Railroad Adjustment Board provided for in the Amended Railway Labor Act, Effective June 21, 1934."

is a true and complete copy of the original rules which are on file in the office of the National Mediation Board, which is a public office of the United States not pertaining to a court.

In witness whereof, I have hereunto affixed the official seal of the National Mediation Board and subscribed my name at Washington, D. C., this 23rd day of September, 1949.

(Seal)

(s) T. E. BICKERS
THOMAS E. BICKERS, Secretary.

COPY

Rules to Govern the Selection of Labor Members of the National Railroad Adjustment Board Provided for in the Amended Railway Labor Act, Effective June 21, 1934.

Pursuant to instructions your committee submits the following as its report and recommendations in respect to the rules under which the labor members of the National Railroad Adjustment Board, created by the Railway Labor Act as amended June 21, 1934, shall be selected:

Our investigation discloses that the following national labor organizations were organized in accordance with the provision of Section 2 of the Railway Labor Act as amended and are the qualified organizations to participate in the making of rules and the selection of the labor members of the adjustment board. We have grouped these organizations in conformity with the several divisions of the adjustment board as defined in the Act as amended:

Division 1—Brotherhood of Locomotive Engineers
Brotherhood of Locomotive Firemen and Enginemen
Order of Railway Conductors
Brotherhood of Railroad Trainmen
Switchmen's Union of North America

Division 2—International Association of Machinists
International Brotherhood of Boilermakers Iron Ship Builders and Helpers of America
International Brotherhood of Blacksmiths, Drop Forgers and Helpers
Sheet Metal Workers' International Assn.
International Brotherhood of Electrical Workers
Brotherhood Railway Carmen of America
International Brotherhood of Firemen & Oilers

Division 3—The Order of Railroad Telegraphers
American Train Dispatchers' Association
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express & Station Employees
Brotherhood of Railroad Signalmen of America
Order of Sleeping Car Conductors
International Brotherhood of Teamsters, Chauffeurs & Stablemen of America

Division 4—National Organization Masters, Mates and Pilots of America
National Marine Engineers' Beneficial Assn.
International Longshoremen's Association
International Seamen's Union of America

(1) Nominees for membership on each division of the adjustment board shall be restricted to the organizations representing employees in said division and no organization shall be permitted to nominate more than one candidate for membership thereon. Such nominations shall be made through the chief executive of each of said organizations or such other medium as each organization shall desig-

nate; provided, however, that when the number of qualified organizations representing the employees embraced in any division of the adjustment board are equal to the number of labor members on that division, then each such organization acting through its chief executive or other medium designated by the organization shall appoint one member to that division of the board.

(2) Except as provided in the preceding paragraph, each nominee for membership on the National Adjustment Board shall be qualified to serve on said board when confirmed by a majority of all the qualified organizations, each acting through its chief executive or other medium designated by the organization; each qualified organization being entitled to one vote.

(3) In the case of a permanent or temporary vacancy on the adjustment board, such vacancy shall be filled by selection in the same manner as in the original selection.

(4) These rules may be revised at any time by a majority of the qualified organizations.

The above rules were adopted at Chicago, Ill., June 29, 1934.

EXHIBIT IX

Memorandum dated May 9, 1949, executed by the Chief Executive Officers of the Five Operating Organizations and the Three Regional Carriers' Committees for the National Railroad Adjustment Board setting up two supplemental boards of four men each with authority to handle cases on the docket of the First Division of the National Railroad Adjustment Board and such additional cases as may be assigned to them by such Division.

NATIONAL MEDIATION BOARD
WASHINGTON

CERTIFICATION

To Whom It May Concern:

I, Thomas E. Bickers, Secretary of the National Mediation Board, do hereby certify that the attached copies of Memoranda dated May 19, 1949, executed by the Chief Executive Officers of the Five Operating Organizations and the Three Regional Carriers' Committees for the National Railroad Adjustment Board (1) setting up two supplemental boards of four men each with authority to handle cases on the docket of the First Division of the National Railroad Adjustment Board and such additional cases as may be assigned to them by such Division, and (2)* recommending certain changes in rules of the First Division with respect to ex parte submissions, are true and complete copies of the original memoranda which are on file in the Office of the National Mediation Board, which is a pub' office of the United States not pertaining to a court.

In witness whereof, I have hereunto affixed the official seal of the National Mediation Board and subscribed my name at Washington, D. C., this 23rd day of September, 1949.

(Seal)

(s) T. E. BICKERS
THOMAS E. BICKERS, Secretary

* No. 2 omitted here as irrelevant.

COPY 5/19/49

MEMORANDUM

The chief executive officers of the five operating organizations and the three regional carriers' committees for the National Railroad Adjustment Board are agreed on the following procedure:

Two supplemental boards of four men each will be set up under the provisions of Section 3 First (w) of the Railway Labor Act with authority to handle cases now on the docket of the First Division of the National Railroad Adjustment Board, assigned to them by such First Division, and such additional cases as may be assigned to them by such Division, as hereafter provided. One board shall consist of one representative each appointed by the Brotherhood of Locomotive Engineers and Brotherhood of Locomotive Firemen and Enginemen, and two representatives appointed by the Carriers. The other board shall consist of one representative each appointed by the Order of Railway Conductors and Brotherhood of Railroad Trainmen, and two representatives appointed by the Carriers.

It is understood that the members on such boards may be changed from time to time. Representatives from any railroad involved in cases assigned to such boards may be appointed as board members to handle cases coming from that railroad and members may be changed from time to time as the cases involve different railroads.

Initially, in assigning cases to such supplemental boards, the First Division shall assign cases which have not been certified for appointment of a referee involving any railroad system where ten or more cases are on the docket as of the date of the appointment of such supplemental boards, involving employes represented by either or both of the Organizations on each board respectively. Example: If the "A" railroad has seven cases involving the B of L E and four cases involving the B of L F & E they will be assigned to the supplemental board on which representatives of those two organizations serve. The same example is applicable to the O R C and B of R T.

Thereafter, from time to time the First Division shall assign to such supplemental boards cases involving a railroad system whenever ten or more cases are docketed, in the same manner as described in the preceding paragraph.

Cases where the interest of an organization not represented on such supplemental board is asserted by either party or by a member of the First Division, shall be retained by the First Division and shall not be assigned to such supplemental board.

It is agreed that such supplemental boards shall be established for a period of one year, and thereafter subject to termination upon request of the chief executive officers of the five operating organizations or the three regional carrier committees upon ninety days' notice.

(s) A. JOHNSTON,
Grand Chief Engineer, Brotherhood of Locomotive Engineers

(s) D. B. ROBERTSON,
International President, Brotherhood of Locomotive Firemen and Enginemen

(s) H. W. FRASER (ROH),
President, Order of Railway Conductors

(s) D. M. MacKENZIE,
Assistant President, Brotherhood of Railroad Trainmen

(s) A. J. GLOVER,
President, Switchmen's Union of North America

(s) H. A. ENOCHS,
Chairman, Eastern Committee for the National Railroad Adjustment Board

(s) D. P. LOOMIS,
Chairman, Western Committee for the National Railroad Adjustment Board

(s) G. A. MACKAY,
Chairman, Southeastern Committee for the National Adjustment Board

Witness: (s) FRANCIS A. O'NEILL, JR.,
Chairman, National Mediation Board